(34)

No. 1020

Supreme Court of the United States

October Term, 1944

JEFFERSON COUNTY, TENNESSEE,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Supreme Court of the United States:

I

SUMMARY STATEMENT OF MATTERS INVOLVED.

The issue presented to the Court by this petition is whether or not the United States, its agencies and corporations, are required by the Fifth Amendment to the Constitution to pay just compensation for taking highways belonging to a municipal arm of the State of Tennessee; and, if so, the measure of value where the owner of the highway is under no duty or obligation to its citizens to replace the highways taken.

There are no disputed material questions of fact.

The petitioner is Jefferson County, Tennessee, a body corporate under the laws of Tennessee and a municipal arm of Tennessee. The respondent, Tennessee Valley Authority, is a corporation created by Congress, with power to sue and be sued (R. 1; 15).

The waters of the French Broad River flow through Jefferson County. The Tennessee Valley Authority constructed a dam impounding the waters of the French Broad River. The impounded waters flooded approximately 123 miles of highway owned by petitioner. (R. 1; 2; 15).

Approximately 28 miles of highways and bridges required reconstruction after the flooding. The remaining 95 miles of highways did not require replacement. (R. 42).

The petitioner and respondent entered into a contract (R. 5-11) settling the liability of the respondent to petitioner for highways requiring reconstruction. Respondent denied any liability for highways taken where no reconstruction was necessary. The issue between the parties as to highways taken where no reconstruction was necessary was thus stated in the contract between them:

> "It is the contention of the Authority (respondent) that it is not legally liable for the taking of any such right-of-way or road and that no provable damage arises from any such taking; while the County (petitioner) contends that it suffers substantial damage due such taking for which the Authority is liable";

and the contract further provided:

> —"Nothing in this agreement shall operate to release any such right or be plead in defense to any suit brought by the County to recover damages for any such taking". (R. 10(10)).

The petitioner brought an action against the respondent in the United States District Court seeking a declaration of

its rights and a determination of the measure of value of its property taken from it by respondent. Motions for summary judgment, supported by affidavits, were filed by both parties. These affidavits make clear (a) that petitioner is under no continuing obligation to replace the roads or highways for which this action was brought (R. 21); (b) that these roads had a replacement value at the time taken of $357,658.00 (R. 22), and an original cost of $186,000.00 (R. 22) plus improvements costing $250,000.00 (R. 26); (c) that the highways were used by and useful to the petitioner at the time taken (R. 25); (d) that all roads requiring repair or replacement had been repaired or replaced under the contract between the parties. (R. 25).

The District Court sustained the motion of respondent holding that respondent was not liable to petitioner for the value of the property of petitioner taken by respondent where petitioner was under no obligation to replace the property so taken. (R. 42).

Upon appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the action of the District Judge (R. 49), holding that since respondent had paid the cost of reconstructing 28 miles of road for which there was a continuing need, and since there was no continuing need for the remaining 95 miles of highways taken, petitioner was entitled to take nothing by its action. (R. 52).

The narrow issue remains: May the United States, through any of its agencies, take the property of a municipal arm of a state without compensation because the future usefulness of the property taken has been destroyed by the taking agency and the municipality is under no continuing obligation to replace the property taken?

II

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (A) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has in this case decided an important question of Federal law which has not, but should be decided by this Court (Supreme Court Rule 38 (5) (b)), and has decided this question in a way which is probably in conflict with the applicable principles decided by this Court (Supreme Court Rule 38 (5) (b)).

Judgment was entered in this case by the United States Circuit Court of Appeals on January 15, 1945. (R. 49).

III

THE QUESTIONS PRESENTED.

1. Where the United States, its agencies or corporations, take roads or highways owned by a municipality, the Fifth Amendment to the Constitution requires the payment of just compensation for the property taken.

2. Just compensation is not predicated upon the obligation or duty of the municipality to replace the roads or highways so taken but is measured by value at the time taken.

3. The cogent evidence of value where service property of a municipality is taken is cost of replacement, and where no duty of restoration or replacement rests upon the municipality, just compensation is best measured by cost of replacement of similar property.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. This case involves an important question of Federal Law which has not been but should be settled by this Court. (Rule 38-5 (b)).

More and more Federal agencies are taking highways of States and their subordinate municipal arms. While the law seems to be settled that streets and highways are property which may not be taken by a Federal agency without the payment of just compensation (*St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92), the question as to what constitutes just compensation for such a taking has not been decided in a direct holding of this Court.

Is it the value of the surface area of the highway as apparently decided in *Benedict* v. *U. S.* 280 F. 76? Is it the cost of replacement of a similar highway as decided in *Wayne County* v. *U. S.* 53 Ct. Cls. 417? Where a partial taking of a single road is involved, two circuits seem to hold that the cost of restoring the road to service is the measure of liability: *U. S.* v. *Wheeler Township*, 66 F 2d 977; *Bedford* v. *U. S.*, 23 F 2d, 453. This Court has recognized the right of the United States to provide by contract for the replacement of all roads of a municipality in *Brown* v. *U. S.*, 263 U. S. 78. However, in addition to the holding in this case, two other district courts have held that where there is no duty of replacement resting upon the municipality, no compensation is due to it for taking its service properties: *U. S.* v. *Alderson*, 53 F. Supp. 528; *U. S.* v. *Certain Parcels of Land*, 54 F. Supp. 667.

It seems to petitioner that this Court should grant the writ sought in this case and settle this important question. Is loss to the owner in case of municipal service property

predicated upon the necessity of performing a continuing duty? Today such a corporation has service properties costing in excess of $430,000.00, with an actual present replacement value of $357,658.00. Does the Fifth Amendment to the Constitution protect such property only if it must be replaced by the owner?

2. The decision of the Circuit Court of Appeals in this case is probably in conflict with the applicable decisions of this Court. (Rule 38-5 (b)).

This Court has held that a street or highway belonging to a municipality is property which may not be taken by the United States, its agencies or corporations, without payment of just compensation (*St. Louis* v. *Western Union Telegraph Company,* 148 U. S. 92), and has recently reaffirmed the principle that the constitutional requirement of just compensation for the taking of private property for public use is addressed to every sort of interest which the citizen may possess in the physical thing taken (*U. S.* v. *General Motors,* decided January 8, 1945, 89 L. Ed. 379).

While this Court has not decided the measure of just compensation for taking municipal service property, certain principles apparently applicable have been decided.

Value for purposes of just compensation is determined as of the date of taking but value does not include and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking (*Olsen* v. *U. S.* 292 U. S. 246). Conversely, it should be true that value is not diminished nor compensation reduced by any element resulting subsequently to or because of the taking.

Value means the full and perfect equivalent in money of the property taken (*U. S.* v. *Miller,* 317 U. S. 369). Value may reflect the use to which the property is presently devoted (*McCanless* v. *U. S.* 298 U. S. 342; *U. S.* v. *Powelson* 319 U. S. 266, *ibid* p. 275). The test is loss to the owner, not

gain to the taker (*Boston Chamber of Commerce* v. *Boston* 217 U. S. 189).

The decision in this case seems in conflict with these principles. The District Court held "——the defendant (respondent) is not liable to the plaintiff (petitioner) for the taking of roads where the County is under no obligation to replace or reconstruct such roads." (R. 44). The Circuit Court of Appeals sustains the decision of the District Court and in its opinion states that in the case of a political subdivision of a state "just compensation cannot be measured by the same standards as compensation for the taking of purely private property" (R. 51); that while highways are property within the protection of the Fifth Amendment to the Constitution with respect to just compensation, nevertheless, "appellant (petitioner) did not have title to *property susceptible to the ascertainment of fair cash value*" (R. 52), and concludes that all the County was entitled to recover was the cost of restoring highways useful after the construction of the dam by respondent and as that had been paid, petitioner would take nothing by its suit. (R. 52-53).

This decision, while recognizing that this Court has declared highways belonging to a municipality to be property which cannot be taken without payment of just compensation, avoids the recognized principle by denying that such property is susceptible to the ascertainment of fair cash value; while recognizing that every sort of interest which the citizen may possess in the physical thing taken is protected by the Fifth Amendment, denies the application of the principal to municipal service properties by its holding that only those properties which the municipality needs to replace have value when taken under the power of eminent domain. The decision does not fix value at the time of taking in accordance with the recognized principle but looks beyond the taking to elements resulting subsequently to

and because of the taking. Thus "just compensation" to a political subdivision of a state is not "measured by the same standards as is compensation for the taking of purely private property."

It seems to petitioner that this decision is in conflict with the principles of the applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9840, *Jefferson County, Tennessee, Appellant,* v. *Tennessee Valley Authority, Appellee,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

JEFFERSON COUNTY, TENNESSEE,

By M. W. EGERTON,
Counsel for Petitioner.

Dated February 21, 1945.